FRANK ASTLE WARD

v.

MALAYSIAN AIRLINES SYSTEM BHD.

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. AZMI SCJ
HARUN HASHIM SCJ
[SC CIVIL APPEAL NO. 02-1-1991]
22 AUGUST 1991

DAMAGES: *Accident - Two insurance policies taken out by employer - Personal accident policy and loss of commercial pilot's licence - Whether payment under either policy can be deducted when assessing damages for negligence - Nature of benefits payable under policies - Terms of contract of employment - Service benefit contractually granted by employer to employee - Non deductible if analogous to wages or lump sum pension or gratuity - Deductible if analogous to sick pay or statutory unemployment benefits - Meaning of "under any contract of assurance or insurance" - Clear words of statute - Retirement age - Whether 55 or 65 years - Applicability of foreign law - Civil Law Act 1956, s. 28(1)(a).*

LABOUR LAW: *Accident - Two insurance policies taken out by employer - Personal accident policy and loss of commercial pilot's licence - Whether payment under either policy can be deducted when assessing damages for negligence - Nature of benefits payable under policies - Terms of contract of employment - Service benefit contractually granted by employer to employee - Non deductible if analogous to wages or lump sum pension or gratuity - Deductible if analogous to sick pay or statutory unemployment benefits - Meaning of "under any contract of assurance or insurance" - Clear words of statute - Retirement age - Whether 55 or 65 years - Applicability of foreign law - Civil Law Act 1956, s. 28(1)(a).*

INSURANCE: *Accident - Two insurance policies taken out by employer - Personal accident policy and loss of commercial pilot's licence - Whether payment under either policy can be deducted when assessing damages for negligence - Nature of benefits payable under policies - Terms of contract of employment - Service benefit contractually granted by employer to employee - Non deductible if analogous to wages or lump sum pension or gratuity - Deductible if analogous to sick pay or statutory unemployment benefits - Meaning of "under any contract of assurance or insurance" - Clear words of statute - Retirement age - Whether 55 or 65 years - Applicability of foreign law - Civil Law Act 1956, s. 28(1)(a).*

STATUTORY INTEPRETATION: *Nature of benefits payable under insurance policy - Service benefit contractually granted by employer to employee - Non deductible if analogous to wages or lump sum pension or gratuity - Deductible if analogous to sick pay or statutory unemployment benefits - Meaning of "under any contract of assurance or insurance" - Retirement age - 55 or 65 years - Civil Law Act 1956, s. 28(1)(a).*

The appellant, an Australian citizen, was a pilot employed by the respondent MAS. On 6 July 1982, an aeroplane flown by the appellant crash landed in Sarawak, as a result of which the appellant suffered various injuries, including serious head injury. MAS admitted 100% liability.

The appellant received a sum of RM600,000 from MAS under two insurance policies taken out by MAS namely:

(a) RM300,000 under a policy for loss of commercial pilot's licence and

(b) RM300,000 under a personal accident policy taken out by MAS for all its employees under the contracts of employment.

The trial Judge assessed general and special damages at RM301,250; however, it was held that the sum of RM300,000 under (b) above should be deducted. The full text of the High Court judgment is reported in [1991] 1 CLJ (Rep) 525.

The appellant now appeals against that decision; his appeal can be classified under the following 3 heads:

1. the findings of fact on quantum of damages;
2. the legality of deduction of RM300,000 and
3. the refusal of the learned trial Judge to order interest on general damages and costs.

In the High Court, the trial Judge had rejected the opinion of Mr. William Alan Douglas (PW1) on his psychological evaluation of the appellant. It was the appellant's contention that the learned Judge should have accepted PW1's uncontradicted findings and that based on *Tominam bte. Tukiman's* case, damages for pain and suffering should have been assessed at RM90,000, instead of RM60,000.

The other complaints raised were in respect of:

- awarding only 50% loss from the 4th year from injury, that is, August 1985 to February 1990 on account of mitigation of damages;
- taking the Malaysian 55 years as the retiring age instead of the Australian 65 years and
- refusal to apply the Ansett Airlines of Australia (Pilots) Award 1989.

Held:

[1] The learned Judge's criticism of PW1's opinion was not completely unjustified; in any event, since *Tominam's* case is the cornerstone of the appellant's argument, the award of RM60,000 for pain and suffering erred if at all on the side of generosity and whatever residual disability suffered by the appellant which the Judge might have omitted, would be sufficiently covered by that award.

[2] The argument that the tortfeasor must take his victim as he finds him cannot be extended to mean that in assessing damages the Court is compelled to apply foreign law and norms in assessing damages in this country. Such an approach would lead to absurdity and uncertainty in our law if awards of damages were to fluctuate greatly depending on the social security law and level of affluence of the injured person's country.

[3] The relevant factor in the award of damages is the injured person himself, not his country or the law governing social security or other domestic rules applicable to his country. As such the learned Judge was justified in the circumstances in reducing his loss of income by 50% from the 4th year of the accident. For the same reason, the Judge did not err in law in applying 55 years as the retiring age of the appellant instead of 65 year.

[4] Foreign law on any particular topic is a question of fact which is to be proved by evidence of an expert; however there was no evidence at all before the High Court that the appellant had ever been employed by the Ansett Airlines of Australia, nor was there evidence that the Ansett Airlines of Australia (Pilots) Award 1989 was applicable to all airlines in Australia.

In the circumstances, the learned Judge was perfectly entitled in refusing to apply the Ansett Award in this particular case. Taking the evidence as a whole, the appellant has failed to show that the assessment was wrong in principle and or wholly unreasonable; therefore the assessment of damages by the trial Judge was correct.

[5] Under the common law it is necessary to consider the nature of the benefits paid or payable under the insurance policy to determine, *inter alia*, whether the money received by the appellant is under a purely personal insurance policy or by way of benefit arising out of his employment. Consideration should also be given on whether the benefit is analogous to wages or to pension.

[6] The benefits payable under the policy in this appeal are not intended to reimburse MAS of payments made by them to their employees under the terms and conditions of the contract of employment. The insurance cover is a service benefit contractually granted by MAS to their pilots on termination of their services arising from death or permanent disability. It is analogous to pension or gratuity and therefore should not be deducted. To be deductible, the contractual payment should be analogous to wages such as sick pay or statutory unemployment benefits.

[7] The insurance payment cannot possibly be treated as if MAS continued to pay part of the appellant's wages after the accident to support the argument against double payment. The loss of earnings, past and future that the appellant is entitled to under the Civil Law Act 1956, which is caused by the negligence of MAS, should not be diminished by such contractual benefits which are analogous to lump sum pension or gratuity even under the common law. Further, although MAS is paying the premium under the contract of employment, the appellant's services given under it form the reward (equivalent to a premium) which entitles him to the benefit. It is a form of lump sum pension or gratuity payable in the event of his death or permanent disability when employment has ceased.

[8] The plain meaning of the words used in s. 28A(1)(a) of the Civil Law Act 1956 should be adopted for the purpose of interpretation. Parliament has made it crystal clear that any sum paid or payable in respect of personal injury which does not result in death "under any contract of assurance or insurance" shall not be taken into account in assessing damages. By providing no exception, the effect would be to eliminate altogether deductibility even in border line situations although the injured person had not directly contributed to the insurance scheme. Therefore, insurance benefits in this case are not deductible both under s. 28(1)(a) of the Act and the common law itself.

[Appeal allowed to the extent that judgment should be entered for the appellant on the full assessment sum of RM301,250.]

[**Bahasa Malaysia** Translation of Headnote]

GANTIRUGI: *Juruterbang warganegara Australia - Kemalangan - Dua polisi insuran diambil oleh majikan - Polisi kemalangan persendirian dan polisi kehilangan lesen komersial juruterbang - Sama ada pembayaran di bawah mana-mana polisi boleh dikenakan potongan bila mentaksirkan gantirugi untuk kecuaian - Jenis faedah-faedah yang patut dibayar di bawah polisi-polisi - Syarat-syarat kontrak pekerjaan - Faedah perkhidmatan kontrak yang diberi oleh majikan kepada pekerja - Tidak boleh dipotong jika serupa dengan gaji atau pencen bayaran sekali gus atau ganjaran - Boleh dipotong jika serupa dengan gaji sakit atau faedah pengangguran statutori - Makna "menurut sebarang kontrak insuran nyawa atau insuran" makna jelas Akta - Umur persaraan - Sama ada 55 atau 65 tahun - Akta Undang-undang Sibil 1956, s. 28(1)(a).*

INSURAN: *Juruterbang warganegara Australia - Kemalangan - Dua polisi insuran diambil oleh majikan - Polisi kemalangan persendirian dan polisi kehilangan lesen komersial juruterbang - Sama ada pembayaran di bawah mana-mana polisi boleh dikenakan potongan bila mentaksirkan gantirugi untuk kecuaian - Jenis faedah-faedah yang patut dibayar di bawah polisi-polisi - Syarat-syarat kontrak pekerjaan - Faedah perkhidmatan kontrak yang diberi oleh majikan kepada pekerja - Tidak boleh dipotong jika serupa dengan gaji atau pencen bayaran sekali gus atau ganjaran - Boleh dipotong jika serupa dengan gaji sakit atau faedah pengangguran statutori - Makna "menurut sebarang kontrak insuran nyawa atau insuran" makna jelas Akta - Umur persaraan - Sama ada 55 atau 65 tahun - Akta Undang-undang Sibil 1956, s. 28(1)(a).*

UNDANG-UNDANG BURUH: *Juruterbang warganegara Australia - Kemalangan - Dua polisi insuran diambil oleh majikan - Polisi kemalangan persendirian dan polisi kehilangan lesen juruterbang - Sama ada pembayaran di bawah mana-mana polisi boleh dikenakan potongan bila mentaksirkan gantirugi untuk kecuaian - Jenis faedah-faedah dibawah polisi-polisi - Syarat-syarat kontrak pekerjaan - Faedah perkhidmatan kontrak yang diberi oleh majikan kepada pekerja - Tidak boleh dipotong jika serupa dengan gaji atau pencen bayaran sekali gus atau ganjaran - Boleh dipotong jika serupa dengan gaji sakit atau faedah pengangguran statutori - Makna "menurut sebarang kontrak insuran nyawa atau insuran" makna jelas Akta - Umur persaraan - Sama ada 55 atau 65 tahun - Akta Undang-undang Sibil 1956, s. 28(1)(a).*

TAFSIRAN AKTA: *Faedah yang patut dibayar di bawah polisi insuran - Faedah perkhidmatan kontrak yang diberi oleh majikan kepada pekerja - Tidak boleh dipotong jika serupa dengan gaji atau pencen bayaran sekali gus atau ganjaran - Boleh dipotong jika serupa dengan gaji sakit atau faedah pengangguran statutori - Makna "menurut sebarang kontrak insuran nyawa atau insuran" makna jelas Akta - Umur persaraan - Sama ada 55 atau 65 tahun - Akta Undang-undang Sibil 1956, s. 28(1)(a).*

Perayu adalah seorang warganegara Australia yang bekerja sebagai juruterbang dengan pihak responden MAS. Pada 6 Julai 1982, kapalterbang yang dipandu oleh perayu terpaksa membuat pendaratan kecemasan di Sarawak dan akibat kemalangan tersebut, perayu telah mengalami kecederaan parah, termasuk di bahagian kepalanya. MAS telah mengakui liabiliti sepenuhnya.

Perayu telah menerima wang sebanyak RM600,000 daripada MAS di bawah dua polisi insuran yang telah diambil oleh MAS, iaitu:

(a) RM300,000 di bawah polisi untuk kehilangan lesen juruterbang komersial dan

(b) RM300,000 di bawah polisi insuran kemalangan persendirian yang diambil oleh MAS untuk semua kakitangan menurut kontrak pekerjaan.

Hakim perbicaraan telah menganggarkan gantirugi am dan gantirugi khas sebanyak RM301,250; walau bagaimanapun, Hakim yang arif berpendapat bahawa jumlah sebanyak RM300,000 daripada (b) di atas sepatutnya dipotong. Penghakiman Mahkamah Tinggi telah dilapurkan dalam keluaran [1991] 1 CLJ (Rep) 525.

Perayu sekarang merayu keputusan tersebut dan rayuannya berdasarkan soalan-soalan seperti berikut:

1. keputusan fakta mengenai kuantum gantirugi;
2. keesahan potongan sebanyak RM300,000 dan
3. keengganan Hakim perbicaraan memberi faedah ke atas gantirugi dan kos.

Dalam Mahkamah Tinggi, Hakim perbicaraan telah menolak pendapat PW1 yang membuat penilaian psikologi terhadap perayu. Perayu juga menghujah bahawa Hakim yang arif sepatutnya menerima penilaian PW1 yang tidak tercanggah itu, dan bahawa berdasarkan kes *Tominam lwn. Tukimin*, yang arif sewajarnya menganggarkan gantirugi untuk kesakitan dan penderitaan sebanyak RM90,000 dan bukannya RM60,000.

Aduan-aduan lain yang dibangkitkan oleh perayu:

- pemberian hanya 50% yang dibangkitkan daripada gantirugi bermula 4 tahun selepas kecederaan iaitu Ogos 1985 sehingga Februari 1990 berdasarkan pengurangan gantirugi;
- mengambil had umur kerja di Malaysia iaitu 55 tahun dan bukan 65 tahun iaitu had umur kerja di Australia;
- keengganan membuat perkiraan menurut Ansett Airlines of Australia (Pilots) Award 1989.

Diputuskan:

[1] Pengkritikan Hakim yang arif terhadap penilaian PW1 bukannya tidak berasas; walau bagaimanapun, memandangkan bahawa kes *Tominam* menjadi asas penghujahan perayu, award RM60,000 untuk kecederaan dan kesakitan adalah lebih dari mencukupi dan apa-apa ketidakupayaan yang berkekalan yang dialami oleh perayu yang mungkin tidak dipertimbangkan oleh Hakim yang arif akan dapat diliputi oleh award itu.

[2] Penghujahan bahawa pelaku tort (tortfeasor) mestilah mengambil mangsa sepertimana ia ditemui tidak boleh dilanjutkan untuk bererti bahawa apabila gantirugi ditaksirkan, Mahkamah apabila menganggarkan gantirugi dalam negara ini, terpaksa menggunakan undang-undang asing dan norma. Pendekatan begitu akan membawa kepada kemustahilan dan kekeliruan dalam undang-undang kita jika award gantirugi dibenarkan bergolak bergantung kepada undang-undang keselamatan sosial dan tahap kekayaan negara orang yang mengalami kecederaan.

[3] Faktor yang perlu diambilkira dalam award gantirugi adalah orang yang mengalami kecederaan itu sendiri dan bukan negara asalnya atau undang-undang keselamatan sosial yang berkuatkuasa di negaranya. Oleh itu, Hakim perbicaraan telah bertindak dengan adil dalam mengurangkan kehilangan pendapatan perayu sebanyak 50% mulai 4 tahun dari tarikh kemalangan. Atas sebab yang sama tuan Hakim tidak mengambil pandangan yang salah dalam undang-undang semasa menggunakan had umur 55 tahun sebagai umur persaraan perayu berbanding dengan 65 tahun.

[4] Undang-undang asing dalam apa-apa jua tajuk adalah persoalan fakta yang perlu dibuktikan melalui keterangan seorang pakar; oleh kerana tidak terdapat apa-apa keterangan yang dihadapkan kepada Mahkamah Tinggi untuk membuktikan bahawa perayu telah bekerja untuk Ansett Airlines of Australia dan juga kerana tidak ada keterangan bahawa Ansett Airlines of Australia (Pilots) Award 1989 meliputi semua syarikat kapalterbang di Australia. Dalam keadaan begitu, Hakim yang arif sememangnya berhak menolak award Ansett dalam kes ini. Setelah meneliti semua keterangan secara keseluruhan, perayu telah gagal membuktikan bahawa anggaran gantirugi yang dibuat adalah salah sama ada dari segi prinsip atau tidak munasabah pada keseluruhannya; oleh sebab itu, pentafsiran gantirugi oleh Hakim perbicaraan adalah betul.

[5] Menurut “common law” adalah perlu untuk mempertimbangkan jenis faedah perlindungan yang dibayar atau wajar dibayar di bawah polisi insuran untuk menentukan, antara lain, sama ada wang yang diterima oleh perayu adalah hanya sebagai polisi insuran persendirian atau sama ada ia merupakan faedah yang timbul akibat pekerjaannya. Pertimbangan juga perlu diberi kepada soalan sama ada faedah itu adalah serupa dengan gaji atau pencen.

[6] Semua pembayaran yang harus dibuat oleh MAS dibawah polisi tersebut tidak bertujuan untuk membayar balik kepada MAS bayaran yang ia telah beri kepada pekerja-pekerjanya. Perlindungan insuran adalah satu faedah perkhidmatan yang diberi secara kontrak kepada juruterbangnya semasa penamatan perkhidmatan mereka atas sebab kematian atau ketidakupayaan berkekalan. Ia adalah serupa dengan pencen atau ganjaran dan oleh itu tidak patut dipotong. Pembayaran kontrak ini hanya boleh dipotong jika ia sama dengan gaji seperti gaji sakit atau faedah pengangguran statutori.

[7] Pembayaran insuran tidak boleh dianggap sebagai sambungan sebahagian gaji perayu selepas kemalangan. Kehilangan pendapatan sebelum dan selepas perbicaraan yang wajar diterima oleh perayu di bawah Akta Undang-undang Sibil 1956, apabila MAS cuai, tidak harus dikurangkan oleh feadah kontrak tersebut yang sama seperti pencen sekali gus atau ganjaran di bawah "common law". Selanjutnya, walaupun MAS membayar premium di bawah kontrak perkhidmatan, khidmat perayu yang diberi di bawah kontrak tersebut membentuk ganjaran (bersamaan dengan premium) yang memberinya hak untuk menerima faedah tersebut. Ia merupakan sejenis bayaran pencen sekali gus atau ganjaran yang akan dibuat sekiranya berlaku kematian atau ketidakupayaan berkekalan atau bila tamatnya tempoh perkhidmatan.

[8] Makna yang jelas bagi kata yang digunakan dalam peruntukkan s. 28A(1)(a) Akta tersebut harus diterima untuk tujuan tafsiran. Parlimen telah menjelaskan bahawa sebarang jumlah yang dibayar atau wajar dibayar berhubung dengan kecederaan persendirian yang tidak mengakibatkan maut "menurut sebarang kontrak insuran nyawa atau insuran" tidak perlu diambilkira dalam pentafsiran gantirugi. Dengan tidak membuat pengecualian, kesannya adalah menghapus potongan sama sekali termasuk kes garis sempadan walaupun orang yang mengalami kecederaan tidak membuat sumbangan terus kepada sekim insuran tersebut. Oleh itu, faedah insuran dalam kes ini tidak boleh dipotong di bawah s. 28A(1)(a) Akta tersebut dan juga dibawah common law.

[Rayuan dibenarkan setakat anggaran gantirugi.]

Cases referred to:
Bradburn v. Great Western Railway Co. [1874] LR 10 Ex 1 ***(cons)***
Hussain v. New Taplow Paper Mills Ltd. [1988] 2 WLR 266 ***(cit)***
Mak Sik Kwong v. Ministry of Home Affairs Malaysia (No. 2) [1975] 2 MLJ 175 ***(cit)***
Nabi v. British Leyland (UK) Ltd. [1980] 1 WLR 529 ***(cons)***
Parry v. Cleaver [1967] 3 WLR 739; [1970] AC 1 ***(cit)***
Tominam bte Tukimin v. Toh Kai Chup [1985] 2 MLJ 345 ***(dist)***

Legislation referred to:
Civil Law Act 1956, s. 28A(1)(a)
Law Reform (Personal Injuries) Act 1948 [UK], s. 2
Social Security Act 1975 [UK], s. 12(1)(a)

For the appellant - R.K. Nathan; M/s. R.K. Nathan & Co.
For the respondents - Ronald Khoo (Radhakrishnan with him); M/s. Shearn Delamore & Co. & Drew & Napier

JUDGMENT

Mohd. Azmi SCJ:

The appellant's claim is for damages for personal injuries and consequential loss suffered by him and caused by the negligence and/or breach of duty on the part of the respondents (Malaysian Airlines System Berhad - "MAS"), their servants or agents. He also claims

interests on general damages at the rate of 8% per annum from date of service of the writ of summons to date of judgment, and on special damages at the rate of 4% per annum from date of accident to date of judgment or payment, and costs.

The appellant, an Australian national, was at all material times employed by MAS as a pilot in the East Malaysia Rural Air Services operating in Sabah and Sarawak. In addition to the Rural Air Services using twin and single engine aircrafts, it is a well-known fact that MAS operate both international and domestic airline passenger and cargo services using modern planes including 737B and 747 jumbo jets for overseas destinations.

It is not in dispute that on 6 July 1982 the appellant, aged 42 years was the pilot of a Norman Islander (BN2) aircraft flying from Long Somado to Lawas in the Fifth Division of Miri, Sarawak, when the said aircraft developed engine trouble causing the appellant to make an emergency crash landing on a football field at Long Bayu near Lawas. As a consequence, the appellant suffered a head injury and other minor injuries.

At the hearing in the High Court on 8 February 1990, MAS through their Counsel, Dato' Ronald Khoo, admitted 100% liability; thus only the issue of quantum of damages both general and special, was left to be determined by the High Court. To save time and costs, an agreed bundle of documents was put in consisting of:

(i) "AB1" Dr. Bala Ratnam's Medical Report.

(ii) "AB2" Dato' (Dr.) Arumugasamy's medical report.

(iii) "AB3" Overseas related medical report.

(iv) "AB4" Related correspondence with defendants (respondents) & Civil Aviation.

(v) "AB5" Documents relating to Department of Social Security (Perth) Australia.

(vi) "AB6" Documents relating to salary & payslips.

(vii) "AB7" Bundle of documents relating to the plaintiff's (appellant's) Employments.

(viii) "AB8" Appellant's (plaintiff's) flight licences.

(ix) "AB9" Australian Industrial Relations Commission Report.

The appellant gave evidence and called a witness in the person of Mr. William Alan Douglas (PW1), a clinical psychologist from Fremantle, Australia who gave expert evidence on residual damage caused by the head injury based on various tests, including IQ tests. MAS called one witness, Capt. Hj. Mohd. Kamil bin Hj. Abu Bakar (DW1), a chief pilot attached to their security division.

In a 41-page written judgment, the learned Judge assessed damages for the appellant as follows:

(a) General damages for pain and suffering.	RM 60,000
(b) Pre-trial loss of earnings:	
(i) RM4,000 per month from the month of August 1983 to July 1985, that is 24 months.	RM 96,000
(ii) RM2,000 per month from August 1985 to February 1990, that is, 55 months.	RM110,000
(c) Post-trial loss of earnings RM2,000 per month for 17 months	RM 34,000

(d) Special damages with interest at 4% per annum from date of accident, that is, 6 July 1982 to date of judgment and thereafter further interest at 8% from date of judgment to date of realisation. RM 1,250

RM301,250

The learned Judge then ordered a deduction of RM300,000 which the appellant had received from an insurance company under a general accident policy taken by MAS for the benefit of the appellant and other employees under the terms of their contract of employment, thereby leaving a judgment sum of only RM1,250. The learned Judge also ordered 4% interest per annum on the judgment sum of RM1,250 from date of accident to date of judgment and thereafter at 8% per annum from date of judgment to date of realisation, which would appear to represent the interests sought for special damages. He further ordered each party to bear its own costs.

In the memorandum, the appellant set out 18 grounds of appeal, but from the submission made by his Counsel, Mr. R.K. Nathan, criticism against the judgment of the learned Judge may be conveniently classified under three heads. Firstly, the appeal is against the finding of fact on quantum of damages. Secondly, the appeal concerns the legality of the deduction of RM300,000 from the accident insurance policy taken by MAS, and lastly, the appeal is against the refusal of the learned Judge to order interest on general damages and costs. In our view, the outcome of the last head of complaint must necessarily follow the event of this appeal.

On quantum of damages, there was no dispute that under pain and suffering, the only main injury to be seriously considered was the head injury of the appellant. Mr. R.K. Nathan submitted that the Judge was wrong in rejecting the opinion of Mr. William Alan Douglas (PW1) on his psychological evaluation of the appellant. Since medical reports of Dr. Bala Ratnam and Dato' (Dr.) Arumugasamy relied upon by MAS, merely touched on neurological evaluation, it is submitted that the Judge ought to have accepted the psychological evaluation made by Mr. Douglas - the only psychologist who gave evidence at the trial. According to Mr. Douglas, he conducted IQ test and other tests on the appellant about three years after the accident and found *inter alia* a gap between the appellant's verbal IQ level and his performance IQ level. According to him, the appellant's brain impairment, caused by the head injury was quite severe. The practical effect of the damage reduced the speed of his information processing ability. He showed a clear inability to plan or organise problem solving strategies in any logical and consistent way. Although his memory of verbal material was within normal limits, his long term memory showed a deterioration of approximately 25%. In Mr. Douglas' opinion, these impairments would be permanent. He examined the appellant again in July 1989, and his assessment confirmed that the appellant's neuro-psychological impairments were permanent. It is also confirmed by the appellant's failure to pass his matriculation studies. According to Mr. R.K. Nathan, if the learned Judge had accepted Mr. Douglas' uncontradicted findings, he would have assessed damages for pain and suffering at RM90,000 instead of RM60,000, based on the case of *Tominam bte Tukimin v. Toh Kai Chup* [1985] 2 MLJ 345. In that case a 25-year old plaintiff sustained a very severe head injury resulting in poor memory and concentration. She was awarded a total sum of RM90,000 as damages for pain and suffering. But in that case we note that the plaintiff also suffered epileptic fit as a result of the brain damage, which to a greater extent required medication all her life. There, the Court awarded RM45,000 for pain and suffering for brain injuries and loss

of amenities and RM12,000 for epilepsy. Dato' Ronald Khoo for the appellant correctly pointed out that based on the authority of *Tominam* the award of RM60,000 in this case should not be held to be inadequate. We agree with him. In rejecting Mr. Douglas' opinion, the learned Judge commented adversely on his psychological evaluation because of failure to take into account the appellant's academic qualification when carrying out the IQ test. Notwithstanding the fact that the appellant is a self-made man who has arisen from the ranks, we are of the view that the learned Judge's criticism of Mr. Douglas' opinion is not completely unjustified. In any event, since *Tominam's* case is the corner stone of the appellant's argument, the award of RM60,000 for pain and suffering erred if at all on the side of generosity, and whatever residual disability suffered by the appellant which the learned Judge might have omitted, would be sufficiently covered by that award.

On loss of earnings, the three main complaints against the assessment of damages, are in respect of awarding only 50% loss from the fourth year, that is, August 1985 to February 1990 on account of mitigation of damage, and secondly in taking Malaysian 55 years as retiring age instead of Australian 65 years; and lastly in refusing to apply Ansett Airlines of Australia (Pilots) Award 1989.

On the loss of 50% earning applied by the Judge, Mr. R.K. Nathan argued that the appellant is now receiving financial assistance from the Social Security Department of Australia. If he were to find a job, he would be penalised, and as such he cannot mitigate his damage. On the other hand, it is not seriously challenged that the appellant is not a vegetable as a result of that unfortunate accident, and that on the fourth year of the accident, he is capable of finding a job albeit of lesser standing than an airline pilot, such as a mechanic, a profession which he successfully held before becoming a commercial pilot in 1965.

The thrust of Mr. R.K. Nathan's argument is that the tortfeasor must take his victim as he finds him. Whilst we appreciate the existence of that principle, it cannot be extended to mean that in assessing damages the Court is compelled to apply foreign law and norms in assessing damages in this country. As argued by Dato' Ronald Khoo, such an approach would lead to absurdity and uncertainty in our law if awards of damages were to fluctuate greatly depending on the social security law and level of affluence of the injured person's country. If a person happens to injure negligently a millionaire or a person with a weak heart, then the tortfeasor must take him as he is, irrespective of the country he comes from. The relevant factor is the injured person himself, not his country or the law governing social security or other domestic rules applicable to his country. As such the learned Judge was justified in the circumstances in reducing his loss of income by 50% from the fourth year of the accident.

For the same reason, the Judge did not err in law in applying the 55 years as retiring age of the appellant instead of 65 years. Finally, it must be observed that there is no evidence at all before the Court below that the appellant has ever been employed by the Ansett Airlines of Australia; nor is there evidence that the Ansett Airlines of Australia (Pilots) Award 1989 is applicable to all airlines in Australia. Foreign law on any particular topic is a question of fact which is to be proved by evidence of expert; *Mak Sik Kwong v. Ministry of Home Affairs Malaysia (No. 2)* [1975] 2 MLJ 175 at p. 180. In the circumstances, the learned Judge was perfectly entitled in refusing to apply the Ansett award in this particular case. Before going to the next point, it must be finally remembered that at all material times the appellant has never been employed as a pilot to fly 737 or 747 aircraft. To be such a pilot, one must have the necessary flying hours as a co-pilot in that type of aircraft. At the time of accident, it was common ground that he was only engaged as a pilot to fly BN2 or such similar class of light aircraft, and in our view for future loss it is too remote to consider him on the basis of

737 jet pilot having regard to his age, academic qualification and his actual past record as a light aircraft pilot, notwithstanding the solitary and abortive offer received by him from an African airline to fly bigger aircraft, before he joined MAS.

Taking the evidence as a whole, we are unable to disturb the findings of fact made by the learned Judge, and sitting as an Appellate Court, we cannot substitute our own assessment for that of the High Court, unless it is shown to our satisfaction that the assessment is wrong in principle and/or wholly unreasonable. In our view, the appellant has failed to do so, and we accordingly confirm the assessment of damages made by the learned Judge.

On the issue of deductibility under the second head, s. 28A(1)(a) of the Civil Law Act 1956 provides:

> 28A(1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account:
>
> (a) any sum paid or payable in respect of the personal injury under any contract of assurance or insurance, whether made before or after the coming into force of this Act;

Mr. R.K. Nathan in his argument urges this Court not to limit the interpretation of this provision to insurance policies the premiums of which are paid by the injured person. On behalf of the respondent, it seems to be suggested that English authorities would only exclude deductibility in cases where the premiums are paid for by the injured person. Thus, in *Bradburn v. Great Western Railway Co.* [1874] LR 10 Ex 1 which was considered in *Parry v. Cleaver* [1967] 3 WLR 739; [1970] AC 1, it was held that in an action for injuries caused by defendant's negligence, a sum received by the plaintiff on an accident insurance policy (which he had paid for) cannot be taken into account in deduction of damages.

In ordering the deduction, the learned Judge relied principally on the House of Lords case of *Hussain v. New Taplow Paper Mills Ltd.* [1988] 2 WLR 266, and *Nabi v. British Leyland (UK) Ltd.* [1980] 1 WLR 529 CA. It would appear that on the question of deductibility, His Lordship applied the simple test of who paid for the premiums of the insurance policy. We regret to say that the law in England on deductibility is not that simple. In fact there the law on this subject is so unsettled that Parliament has intervened with a compromise solution by providing in some instances that half of certain payment, over a period can be deducted in assessing the loss, for example, s. 2 of the Law Reform (Personal Injuries) Act 1948. But this type of solution is not open to any Court where the statute is silent. The guiding principle governing decision in border line situations is that:

> The common law has treated this matter as one depending on justice, reasonableness and public policy" (per Lord Reid in *Parry v. Cleaver* [1970] AC 1 at p. 13).

It should be noted that in *Hussain's* case, the deduction allowed was in respect of payment of full "sick pay" paid by the employers to the injured employee in accordance with the terms of his contract of employment for the first 13 weeks after the accident, under a "permanent health insurance scheme" to which employees, like Hussain were not required to contribute. The employers were reimbursed for any payment made under the scheme under an insurance policy taken out by them with the insurers. Although the "sick pay" payable under the scheme was contractual in nature between plaintiff and the employers, the salient points to be observed are that firstly the deduction in *Hussain's* case and as well as in *Nabi's* case, related only against award of damages for the plaintiff's loss of earnings and not against damages for pain and suffering. Secondly, the nature of payments of the "sick

pay" payable under the scheme under the contract of employment were the very opposite of a pension, which was payable only after employment has ceased. It was also held that the fact that the employers took the precaution to insure their liability under the scheme, and would be reimbursed of all payments made under the scheme did not affect the issue in that particular case. On the other hand, in *Nabi's* case it was held that in the absence of statutory provision to the contrary, unemployment benefit received by the injured employee under s. 12(1)(a) of the Social Security Act 1975 was deductible from damages for loss of earnings although contributions were made both by his employer and himself.

What are the facts in the present appeal? As can be observed, even under the common law it is necessary to consider the nature of the benefits paid or payable under the insurance policy to determine *inter alia* whether the money received by the appellant is under a purely personal insurance policy or by way of benefit arising out of his employment. Consideration should also be given on whether the benefit is analogous to wages or to pension. It is not in dispute that under the terms of the contract of employment between MAS and the appellant, the former are obliged to take out personal insurance policy to cover all their pilots and certain other category of employees in case of death or permanent disablement. The insurance money is payable by the insurers direct to the injured pilot irrespective of negligence on the part of anyone, or whether the fatal or permanent injury is caused by riots, civil commotion or war risks.

Under the Terms and Conditions of Employment of Temporary Pilots 1981, cls. 1 and 3 of the Second Schedule provide as follows:

> Second Schedule
>
> **Service Benefits and Allowances**
>
> | | |
> |---|---|
> | Personal Accident Insurance | 1. A pilot employed by the company will be insured against death or permanent disablement for an amount that will be determined by the company from time to time. Such insurance cover shall be on a 24 hours basis and will include death or permanent disablement resulting from riots and civil commotion as well as war risks whether or not war has been declared. |
> | Loss of Licence Insurance | 3. (1)The company will effect, at its own expense, insurance on behalf of each pilot in its employ against loss of his licence on medical grounds.
(2)The insurance cover to be provided under para. (1) of this clause will be RM220,000 for co-pilots and RM300,000 for captains, provided that the company shall not bound to effect such cover if such cover is not obtainable in the London market in which event, the company will effect insurance cover up to such maximum sum as is available. |

There is no dispute that under cl. 1 of the said Personal Accident Policy, the appellant has received RM300,000 from the insurers (Malaysian National Insurance Sdn. Bhd.) and in addition he has also received another RM300,000 under cl. 3 for the loss of his pilot licence. Admittedly deduction is not sought by MAS in respect of payment under cl. 3.

Unlike *Hussain's* case, the benefits payable under the policy in this appeal are obviously not intended to reimburse MAS of payments made by them to their employees under the terms and conditions of the contract of employment. In our opinion the insurance cover is a service benefit contractually granted by MAS to their pilots on termination of their services arising from death or permanent disability. It is analogous to pension or gratuity and therefore should not be deducted. To be deductible the contractual payment should be analogous to wages such as "sick pay" in *Hussain's* case, or statutory unemployment benefits as in *Nabi's*

case. Here the insurance payment cannot possibly be treated as if MAS continued to pay part of the appellant's wages after the accident to support the argument against double payment. The loss of earnings, past and future that the appellant is entitled under the Civil Law Act 1956, which is caused by the negligence of MAS, should not be diminished by such contractual benefits which are analogous to lump sum pension or gratuity even under the common law. Further, although MAS is paying the premium under the contract of employment, the appellant's services given under it form the reward (equivalent to a premium) which entitles him to the benefit. As alluded to earlier, it is a form of lump sum pension or gratuity payable in the event of his death or permanent disability when employment has ceased.

To put the issue of deductibility beyond doubt in the present appeal, our Parliament has fortunately for the appellant introduced s. 28A(1)(a) by Act A308 which came into force on 30 May 1975. The intervention of the new provision goes beyond introducing mere compromise solution against deductibility. We agree with Mr. R.K. Nathan that the plain meaning of the words used in that section should be adopted for purpose of interpretation. Adopting the strict rule of interpretation, our Parliament in its wisdom has made it crystal clear that any sum paid or payable in respect of personal injury which does not result in death "under any contract of assurance or insurance" shall not be taken into account in assessing damages. By providing no exception, the effect would be to eliminate altogether deductibility even in border line situations although the injured person has not directly contributed to the insurance scheme.

For the above reasons, it is our opinion that having regard to the nature of the scheme of the policy, the insurance benefits in this case are not deductible both under s. 28A(1)(a) and the common law itself. The appeal is allowed to this extent and judgment should therefore be entered for the appellant on the full assessment sum of RM30l,250. Following this event, the appellant should also be entitled to interest at 8% on general damages from date of service of writ of summons to date of judgment, as well as costs, both here and below, in addition to interests on special damages already ordered in the High Court on the sum of RM1,250.

Also found at [1991] 3 CLJ 2053